

Ms. J. Maeder



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Design for Health, Inc.

File: B-239730

Date: September 14, 1990

Kabir Shefa for the protester.
Johanna Fann for Concord Analysis, Inc., an interested party.
Herman A. Pequese, Department of the Air Force, for the agency.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the legal entity shown on the bid form and the legal entity shown on the bid bond are not the same, and it is not possible to conclude from the bid itself that the two entities intended to bid as a joint venture, the contracting officer properly rejected the bid as nonresponsive.

DECISION

Design for Health, Inc. protests the rejection of its bid under invitation for bids (IFB) No. F04626-90-B0018, issued by the Department of the Air Force for analysis and removal of asbestos at Travis Air Force Base, California. Design for Health contends that the Air Force improperly rejected its low bid for a defective bid bond.

We deny the protest.

The solicitation, issued on February 12, 1990, was set aside for small disadvantaged businesses and required a bid guarantee in the form of a bid bond or certified check in the amount of 20 percent of \$1,400,000, or \$280,000, the minimum quantity of work which would be required under the contract.

Of the eight bids received by the April 12 bid opening, Design for Health was the low bidder with a total bid price of \$2,159,495. In the bid form, the bidder was identified as "Design for Health," at a San Diego, California, address

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and the bid was signed by Virginia L. Shefa, its Vice President and General Manager. In the representations and certifications under "Type of Business Organization," Design for Health completed the section as follows:

"The bidder, by checking the applicable box, represents that (a) it operates as x a corporation incorporated under the laws of the State of California, an individual, a partnership, a nonprofit organization, a joint venture, or a corporation, registered for business in ."

(country)

In the same section, Design for Health also checked that it was a women-owned/disadvantaged small business concern.

With its bid, Design for Health submitted a cashier's check for \$61,750. The bid was also accompanied by a bid bond, issued by a corporate surety, which referred to the instant IFB and had a penal sum of 20 percent of the bid price. The bond, however, identified "Performance Abatement Services, Inc.," of Lenexa, Kansas, as the principal. On the bond, the principal was to indicate under "Type of Organization" whether it is an individual, partnership, joint venture, or corporation. These spaces, however, were left blank.

The Air Force determined that the bid guarantee submitted by Design for Health was defective because its cashier's check was not in the required amount of \$280,000. The agency therefore rejected Design for Health's bid as nonresponsive and notified Design for Health of this rejection in a letter dated April 27. Design for Health protested to the agency in a letter dated May 1, arguing that its bid was responsive because it and Performance Abatement Services had a joint venture relationship and that was why the bid included a bid bond made out to Performance Abatement. Design for Health said that the cashier's check was only for 20 percent of the laboratory fees.

The Air Force denied the protest because, in its view, the bid was submitted by Design for Health and was not supported by an adequate bid guarantee. The cashier's check which had been purchased by Design for Health was in an insufficient amount and the bid bond named a different entity, Performance Abatement, as principal. The agency noted that there was nothing in the bid which would indicate that there was a joint venture relationship between the two companies since (1) Design for Health had not represented that it was a

joint venture; (2) no representative of Performance Abatement had signed the bid; and (3) Design for Health was not listed as one of the principals on the bid bond.^{1/}

Design for Health filed a protest with our Office on May 17.^{2/} The protester argues that it did provide an acceptable bid guarantee and states that its failure to check "joint venture" in the representations and certifications was merely an administrative omission. The protester seems to suggest that its status as a joint venture was clear from the documents submitted because a representative of Performance Abatement signed the bid bond. Moreover, the protester contends that the agency could have easily clarified the relationship between Design for Health and Performance Abatement by seeking explanation from the parties after bid opening.

We agree with the Air Force that the bid was nonresponsive because of the discrepancy between the bidder and the principal shown on the bid bond. Bid bond requirements are a material part of the IFB and a contracting officer cannot waive a failure to comply with such provision. C.W.C. Assoc., Inc. and Chianelli Contracting Co., 68 Comp. Gen. 164 (1988), 88-2 CPD ¶ 612. The sufficiency of a bid bond depends on whether the surety is clearly bound by its terms at the time of bid opening; when the liability is not clear, the bond is defective. This rule is prompted by the rule of suretyship that no one incurs a liability to pay the debts of another unless he expressly agrees to be bound. G&C Enters., Inc., B-233537, Feb. 15, 1989, 89-1 CPD ¶ 163. For this reason, the principal listed on the bid bond must be the same as the nominal bidder. Opine Constr., B-218627, June 5, 1985, 85-1 CPD ¶ 645. A bid bond which names a principal different from the nominal bidder is deficient and the defect may not be waived as a minor informality. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194.

^{1/} The Air Force also questions whether the protester qualifies as a disadvantaged small business concern. This is academic if the bid is nonresponsive for lack of an adequate bid guarantee and, in any event, as the Air Force recognizes, would be a matter to be resolved by the Small Business Administration and not our Office.

^{2/} Subsequently, the agency canceled this solicitation after it concluded that the only bid other than the protester's still under consideration for award also was nonresponsive. That bidder's protest of the cancellation is the subject of another protest (B-239730.3) to be later decided.

In this case, the entity named on the bid was different from the entity named on the bid bond and, reading all of the bid documents together without resort to post-bid opening explanations, we cannot interpret the bid as having been submitted by Design for Health and Performance Abatement as a joint venture. The bid itself is wholly consistent as a bid solely by Design for Health, a California corporation. There is no reference to Performance Abatement anywhere on the bid and the bid is not signed by any Performance Abatement representative. In addition, the bidder certified that it was a California corporation, not a joint venture. Conversely, there is no reference to Design for Health on the bid bond; the spaces on the bid bond for designating the organization type of the principal were left blank. Given these circumstances, we cannot conclude that the surety named on the bid bond would be liable for the default of Design for Health. Because the legal entity listed on the bid is not the same as the legal entity listed on the bid bond, the government is not protected.

The protester's explanation that its intent was to bid as a joint venture on this procurement, coming as it did after bid opening, cannot be considered in determining whether the bond as submitted is responsive to the solicitation.

Minority Enters., Inc., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A nonresponsive bid cannot be made responsive after bid opening through a change or explanation of what was intended. Id.

We deny the protest.



for James F. Hinchman
General Counsel